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No. 377

Supreme Court of the United States

OCTOBER TERM, 1940

HIRAM R. EDWARDS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. FORREST McCUTCHEON,
801 Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

BLANK PAGE

SUBJECT INDEX

SUBJECT INDEX (Continued)

TABLE OF CASES

TABLE OF CASES (Continued)

TABLE OF STATUTES

BLANK PAGE

Supreme Court of the United States

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No. -------

HIRAM R. EDWARDS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Summary Statement of Matters Involved.

Your petitioner, Hiram R. Edwards, respectfully shows unto the Court that he was found guilty, after a plea of *nolo contendere,* in the United States District Court for the Western District of Oklahoma, for violation of Sec. 77, e and q, Tit. 15, U.S.C.A.; Sec. 338, Tit. 18, U.S.C.A.; and Sec. 88, Tit. 18, U.S.C.A.; and on the 29th day of January, 1940, was sentenced by the court to serve three years on each count of the indictment, the sentences of confinement to run concurrently, in a penitentiary to be designated by the Attorney General (R. 50-51).

The cause in the trial court was styled "*The United State of America, Plaintiff*, vs. *Hiram R. Edwards, Defendant*," being No. 12,682 on the Criminal Docket of said court (R. 5).

After conviction, petitioner duly appealed from the judgment and sentence of the Trial Court to the United States Circuit Court of Appeals for the Tenth Circuit, the cause there being No. 2078 and styled "*Hiram R. Edwards, Appellant*, vs. *United States of America, Appellee*," which judgment and sentence of the trial court was on the 29th day of June, 1940, affirmed by the Circuit Court of Appeals (R. 76-77).

Petition for rehearing was filed on the 22nd day of July, 1940, (R. 77-78) and overruled by the Circuit Court of Appeals on the 22nd day of July, 1940, (R. 82).

The indictment contains eleven counts, the first and second counts charging the sale of securities in various Oklahoma trusts by use of the United States mails and in connection therewith in employing a device, scheme and artifice to defraud in violation of Sec. 17 (a) (1) of the Securities Act of 1933, as amended, (Sec. 77q, Title 15, U.S. C.A.); the third count charging a violation of Sec. 17 (a) (2) of the Securities Act of 1933, as amended, (Sec. 77q, (a) (2), Title 15, U.S.C.A.); the fourth count charging a violation of Sec. 5 (a) (1), of the Securities Act of 1933, as amended, (Sec. 77e, (a) (1), Title 15, U.S.C.A.); the fifth count charging a violation of Sec. 5 (a) (2), of the Securities Act of 1933, as amended, (Sec. 77e (a) (2), Title 15, U.S.C.A.); the sixth, seventh, eighth, ninth and tenth counts charging a violation of Sec. 338, Title 18, U.S.C.A.; and the

eleventh count charging a violation of Sec. 88, Title 18, U.S.C.A., i. e., a conspiracy with one R. B. Binger to violate the Securities Act of 1933 and the mail fraud statute (R. 5-40).

The indictment was filed in court on the 15th day of November, 1938, and was signed by John Brett, Assistant United States Attorney. The indictment was not signed by the foreman of the Grand Jury, but was endorsed by one Ernest W. Clarke, "*Foreman*" (R. 40).

On December 16, 1938, petitioner filed his demurrer to the indictment (R. 41-43), setting forth in substance that the indictment was fatally defective in that the same failed to charge petitioner with a violation of any valid law of the United States under the Constitution; that the indictment was not signed by the Foreman of the Grand Jury of the Western District of Oklahoma and hence invalid; that each of the counts of the indictment, except the conspiracy count, was defective for the reason that the allegations of fraud and misrepresentations were not properly negatived, which allegations were incorporated by reference in the other counts of the indictment; that Count 3 of the indictment was insufficient and defective for the reason that the allegations therein were made up entirely of conclusions and not based on any fact or facts failing to show wherein the alleged omissions to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made, not misleading; that Counts 4 and 5 of the indictment, charging the sale of securities through the mails and in interstate commerce without having in effect a registration statement filed with the Securities and Exchange Commission, were insufficient

in that it did not appear in the indictment that said securities were of a class required to be registered under the law; and that Count 11 of the indictment, i. e., conspiracy, was insufficient for the same reasons set forth with reference to Counts 4 and 5 of the indictment.

On December 16, 1938, petitioner filed his plea in bar to the prosecution, setting forth in substance that he had been compelled to testify against himself under subpoena and after having claimed his immunity against self-incrimination at a hearing before the Securities and Exchange Commission in connection with the same matters and things which are the basis of the indictment herein and the connection of petitioner therewith, and that by virtue thereof, in accordance with the Constitution of the United States and Section 22 (c) of the Securities Act of 1933, as amended, (Sec. 77 v (c), Title 15, U.S.C.A.), petitioner was immune from prosecution and the government barred therefrom (R. 43-45). Said plea in bar was duly verified and had attached thereto a letter from the General Counsel of the Securities and Exchange Commission dated December 8, 1938, refusing the application of petitioner for a copy of the transcript of the testimony of petitioner in said hearings (R. 45-46).

On February 28, 1939, respondent filed its motion to strike said plea in bar with objection to the production of said transcript, the same having attached thereto an affidavit of an attorney of the Securities and Exchange Commission (R. 46-49).

On March 1, 1939, petitioner filed his motion to strike said affidavit opposing said plea in bar (R. 49).

On March 1, 1939, said demurrer and said plea in bar were presented to the trial court, overruled by the court, and exception taken and allowed (R. 49-50). *The motion of respondent to strike the plea in bar was overruled* and exception allowed (R. 50). Thereafter, on the 17th day of December, 1938, petitioner entered a plea of not guilty (R. 50), but on October 25, 1939, changed his plea of not guilty to a plea of *nolo contendere* (R. 50), and on January 29, 1940, was found guilty by the court and sentenced as above set forth.

Notice of Appeal under Rule III was duly given, (R. 51-52), setting forth the grounds of appeal, and thereafter appeal bond was duly filed (R. 53).

At the time of the argument of the cause before the Circuit Court of Appeals, respondent, by and through its United States Attorney for the Western District of Oklahoma, introduced in evidence and filed the same, *de novo*, over the objection of petitioner, an affidavit of John Brett, Assistant United States Attorney for the Western District of Oklahoma (R. 55-56), and a purported transcript of matters before the Securities and Exchange Commission, which transcript was not signed by the Court Reporter, nor was there any proof of the correctness of same (R. 56-72). This purported transcript was likewise introduced before the Appellate Court, *de novo*, without the right of cross-examination on the part of petitioner and without any proof whatsoever of the correctness or authenticity of the exhibit introduced. *Neither were contained in the record from the trial court.*

The specifications of error and points relied upon in the appeal from the trial court to the Circuit Court of Ap-

peals, and herein involved, in addition to the foregoing objection of petitioner to the introduction of evidence, *de novo*, before the Circuit Court of Appeals, are as follows:

> "1. The court erred in overruling Appellant's plea in bar and application for production of transcript of evidence.
>
> "2. The court erred in overruling the demurrer of Appellant to the Indictment.
>
> "3. The judgment of the court is contrary to law in that the court sentenced Appellant to three years on each count of the Indictment, whereas Appellant was found guilty and convicted of no valid substantive offense charged and the sentence of three years on the Conspiracy Count was and is illegal and invalid."

The Circuit Court of Appeals based its affirmance of the case substantially on the following grounds: (1) That the request of petitioner for the Trial Court to compel respondent to furnish a transcript of the proceedings wherein he alleged that he testified under compulsion before the Securities and Exchange Commission after having claimed his immunity against self incrimination was a matter addressed to the discretion of the court and that the same was not herein abused by the denial of petitioner's prayer and that even though Rule IV of the Rules and Regulations of the Commission, promulgated under Section 19 (a) of the Securities Act of 1933, providing that hearings shall be stenographically reported and that copies thereof shall be furnished to the parties at certain fixed prices and that even though there were references in the plea in bar to the proceedings as hearings, since there was no allegation that they were hearings petitioner was not entitled to have a transcript of his testimony introduced in evidence; (2) that although

petitioner filed his plea in bar setting forth that he had testified under compulsion before the Securities and Exchange Commission, after having claimed his immunity against self incrimination, under the provisions of Sec. 22 (c) of the Act, nevertheless, the record failed to indicate any evidence to sustain such allegations; (3) that the demurrer to the eleventh count of the indictment, i. e., the conspiracy count, which attacked that count on the ground of failure to charge that the securities in question were not of a class exempted under Sec. 3 of the Securities Act, was properly overruled, the Circuit Court holding that such exception need not be negatived in the indictment; (4) that inasmuch as the eleventh count of the indictment, i. e., conspiracy count, was good that it was unnecessary to explore the questions presented in the other counts inasmuch as where the sentences run concurrently and do not exceed that which was properly imposed upon the good count the judgment will stand (the Circuit Court of Appeals wholly failed to take into consideration that the maximum confinement that might be imposed on said good count, i. e., the conspiracy (Sec. 88, Tit. 18, U.S.C.A.), is two years instead of three years, on which petitioner was sentenced to *three years* imprisonment); (5) that while it would have been better practice for the word "Foreman" in the endorsement on the indictment to be followed by the words "of the Grand Jury," the same was not essential to the validity of the indictment, no Federal Statute having been called to the Court's attention providing that the Foreman shall sign the indictment at the bottom thereof instead of endorsing the same on the back thereof simply with the word "Foreman" instead of "Foreman of the Grand Jury."

II.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein as to the first issue presented above in overruling petitioner's plea in bar and application for production of a transcript of evidence involves an important question of federal law and is an erroneous decision on an important question of general law which is in conflict with the weight of authority.

2. The decision of the Circuit Court of Appeals herein as to said first issue is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

3. The decision of the Circuit Court of Appeals herein as to said first issue is one in direct conflict with the provisions of the Constitution of the United States and the Amendments thereto, the laws of the United States thereunder and the decisions of this Court with reference thereto.

4. The decision of the Circuit Court of Appeals herein, as to the second issue presented above, in overruling the demurrer of petitioner to the indictment, is a decision of a federal question in a way probably in conflict with applicable decisions of this Court and involves an important question of federal law which has not been definitely settled, but should be settled, by this Court.

5. The decision of the Circuit Court of Appeals herein as to the third issue presented above, in affirming the sentence of the trial court wherein petitioner was sentenced to serve three years on conviction of violation of Sec. 88, Tit.

18, U.S.C. A., i. e., conspiracy, is in conflict with the law and the applicable decisions of this Court.

6. The decision and action of the Circuit Court of Appeals herein in receiving in evidence, *de novo*, original exhibits, which were not contained in the record on appeal, so far departs from the accepted and usual course of judicial proceedings and is an erroneous action and decision of an important question of general law, in conflict with the weight of authority, and in a way probably in conflict with applicable decisions of this Court, as to call for an exercise of this Court's power of supervision.

7. The decision and action of the Circuit Court of Appeals herein with reference to the matter next preceding is an action and decision in conflict with the decisions of other Circuit Courts of Appeals for other Circuits, on the same matter.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Tenth Circuit had in the case numbered and entitled on its docket, No. 2078, "*Hiram R. Edwards, Appellant*, vs. *United States of America, Appellee*," to the end that this case may be reviewed and determined by this Court as provided for by the statutes and laws of the United States of America; and that the judgment herein of the said United States District Court for the Western District of Oklahoma and the United States Circuit Court of Appeals for the

Tenth Circuit affirming that judgment, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 20th day of August, 1940.

J. FORREST MCCUTCHEON,
801 Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

Certificate of Counsel

I hereby certify that I have carefully examined the record and, in the light of its contents, consider the Petition for Writ of Certiorari well founded, and that it is not interposed for purpose of delay.

J. FORREST MCCUTCHEON,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1940

No. ------

HIRAM R. EDWARDS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals was rendered on the 29th day of June, 1940, and is set forth in the record at pages 72-76. We do not understand that the same has as yet been officially reported.

II.

Jurisdiction.

(1) The judgment of the Circuit Court of Appeals for the Tenth Circuit, sought to be reviewed herein, is dated and was entered on the 29th day of June, A. D., 1940, (R. 76-77). A petition for rehearing was duly filed in said Circuit Court of Appeals on the 22nd day of July, A. D., 1940,

leave of the court being had therefor, (R. 78-81), and on the said 22nd day of July, A. D., 1940, said Circuit Court of Appeals entered its order denying said petition for rehearing (R. 82).

(2) The statutory provisions which sustains the jurisdiction of this Court is Section 240 (a) of the Judicial Code, Sec. 347, Tit. 28, U.S.C.A.

(3) The cases which it is believed sustain said jurisdiction, among others, are as follows:

Counselman v. *Hitchcock*, 142 U. S. 562;
Boyd v. *United States*, 116 U. S. 616;
United States v. *Mayer*, 235 U. S. 55;
Whitney v. *Dick*, 202 U. S. 132;
Russell v. *Southard*, 12 How. 139, 158, 159;
Pointer v. *United States*, 151 U. S. 396;
Patton v. *United States*, 281 U. S. 276;
Warner v. *New Orleans*, 167 U. S. 467;
United States v. *Gulf Refining Co.*, 268 U. S. 542;
United States v. *Young*, 232 U. S. 155.

(4) The decision of the Circuit Court of Appeals affirming the judgment and sentence of the trial court wherein said trial court overruled petitioner's demurrer to the indictment and his plea in bar to prosecution based on averments, duly verified, that he had testified before the Securities and Exchange Commission, pursuant to subpoena and under compulsion after having claimed his immunity against self incrimination pursuant to his Constitutional rights and those as provided for by Section 22 (c) of the Securities Act of 1933, as amended, was a decision and opinion contrary to the great weight of authority, the laws and statutes

and the Constitution of the United States and the applicable decisions of this Court; that the sentence of the court to *three* years imprisonment on the eleventh count of the indictment, i. e., a charge of *consipracy*, (Sec. 88, Tit. 13, U.S.C.A.) was violative of the legal rights of petitioner, contrary to law and in direct conflict with the decisions of this Court; that the reception in evidence by said Circuit Court of Appeals of matter and evidence, *not in the record on appeal*, was an action and decision of the court in conflict with the decisions of other Circuit Courts of Appeals for other Circuits, on the same matter, and such a departure from the accepted and usual course of judicial proceedings and such an erroneous action and decision in conflict with the weight of authorities, the laws of the United States, and in conflict with the applicable decisions of this Court, as to bring the case within the jurisdictional provisions relied upon.

III.

Statement of the Case.

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this Brief, the same as if here repeated again in full, however, in addition thereto it is deemed advisable to call attention to the following:

The plea in bar of petitioner, under his oath, in substance alleged that on or about the 14th day of April, 1938, and on two successive times pursuant to subpoenas *duces tecum*, he appeared and testified before an officer of the

Securities and Exchange Commission and after having claimed his immunity against self incrimination, as provided by Section 22 (c) of the Securities Act of 1933, as amended, and the Constitution of the United States, he was immune from prosecution and that by virtue of the foregoing the same should be barred. The plea refers to the "proceedings" as *"hearings"* (R. 43-45).

Petitioner, in said plea in bar prayed the court to require the Securities and Exchange Commission to produce a transcript of his said testimony before said Commission and *that he be heard on the merits of his plea in bar* (R. 45). The Securities and Exchange Commission, by and through its General Counsel, under date of December 8, 1939, advised Counsel for petitioner that the evidence adduced by the Commission had been transmitted to the Attorney General for criminal prosecution and that an indictment had been returned against petitioner and the Commission refused to furnish petitioner with a transcript of his testimony before such hearing (R. 45-46). The trial court refused to hear petitioner on the merits of the plea in bar, and as hereinbefore stated, the plea in bar was overruled by the trial court, to which petitioner excepted (R. 49-50).

Respondent moved to strike petitioner's plea in bar (R. 46-49), *which motion was not granted by the trial court* but was likewise overruled (R. 49-50).

Attention is called to the introduction in evidence by Respondent before the Appellate Court, as an original exhibit, which was not included in the record on appeal, of an affidavit of an Assistant United States Attorney to the effect that the Trial Court refused to receive said transcript

in evidence and that he did not need the same to pass upon said plea in bar and *that without hearing evidence he was going to overrule said plea in bar,* and that at no time did the trial court use the transcript of petitioner's testimony in connection with his action in overruling said plea in bar (R. 55-56).

Respondent, also, introduced in evidence, *de novo,* before the Circuit Court of Appeals, the same not being in the record on appeal, a purported transcript of the testimony of petitioner, as aforesaid (R. 56-72), it not appearing that the same was a true and correct record of such testimony and proceedings, there being no certificate of the Court Reporter shown, and petitioner having no right of cross-examination for the purpose of testing the correctness or authenticity of said exhibit.

Petitioner objected to the introduction in evidence of the foregoing original evidence before the Circuit Court of Appeals, but the same was received by the court nevertheless (R. 55).

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that petitioner was not entitled to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission, or to be heard on the merits of his plea in bar.

(2) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling petitioner's plea in bar.

(3) The Circuit Court of Appeals erred in affirming the judgment of the trial court and approving the action of the trial court in overruling petitioner's demurrer to the indictment.

(4) The Circuit Court of Appeals erred in affirming the judgment of the trial court as to the sentence of petitioner to imprisonment of *three* years on the eleventh count of the indictment, i. e., *conspiracy,* (violation of Sec. 88, Title 18, U.S.C.A.).

(5) The Circuit Court of Appeals erred in receiving in evidence, *de novo,* over the objection of petitioner, certain exhibits and evidence not included in the record on appeal.

V.

ARGUMENT

Point A

(Specification of Errors Nos. 1 and 2)

The Circuit Court of Appeals erred in affirming the judgment of the trial court wherein petitioner's plea in bar and application to be heard on the merits thereof and to have produced in evidence thereof the transcript of his testimony before the Securities and Exchange Commission was overruled.

As stated, *supra,* petitioner filed a plea in bar to the prosecution in the trial court, duly verified, alleging that he had appeared before the Securities and Exchange Commission, pursuant to subpoena, and after having claimed his immunity against self-incrimination, testified under compulsion against himself under oath pursuant to various questions propounded by an officer of the Commission concerning his identity and relationship to the matters which were the subject of the prosecution herein (R. 43-46).

Said plea in bar included a prayer seeking to compel respondent to produce a transcript of said testimony and a prayer that he be heard on the merits of the plea in bar (R. 45), which plea in bar and application for production of said transcript and prayer to be heard on the merits of the plea were overruled by the trial court and exception of petitioner allowed (R. 50).

The Circuit Court, with reference to the order of the trial court, in overruling said plea in bar took the view that despite petitioner's claim the record failed to indicate that any evidence was offered to sustain the allegations of fact therein, and in the absence of such evidence the plea was properly denied.

Petitioner's plea in bar was verified and the same fully stated facts compelling the court to order a reply thereto denying the same. The reply of respondent was not granted by the trial court *but was overruled* (R. 50). Thus, we have the verified plea in bar of petitioner, insofar as the trial court's order is concerned, standing unchallenged. Furthermore, the plea in bar prayed the court to be heard on the merits of the plea which was likewise overruled by the court and to which petitioner excepted.

A plea in bar, as in the instant case, where proper request is made for a hearing on the merits thereof, requires the court to hear evidence for the purpose of testing the sufficiency of the averments and allegations contained in said plea, and we respectfully submit that the failure and refusal of the trial court to hear petitioner thereon was reversible error and that the Circuit Court of Appeals erred in affirming the judgment of the trial court with reference thereto.

The affidavit of John Brett, Assistant United States Attorney (R. 55-56), is, in part, as follows, to-wit:

> "Judge Vaught, stated that he did not care to see the transcript, that he did not need them to pass upon the said plea in bar, and that he was going to overrule the defendant's plea in bar."

We submit that petitioner did offer to sustain the allegations in his plea in bar by his prayer in said plea requesting to be heard on the merits of the case and for a production of the transcript of his testimony before the Securities and Exchange Commission.

We say that a second request, a third request, a fourth request or others would not have made the position of petitioner any stronger than the original request and prayer which in substance amounts to a proffer of proof which was overruled by the court and to which order of the court petitioner excepted.

The Fifth Amendment to the Constitution of the United States, among other things, provides that "no person * * * shall be compelled in any criminal case to be a witness against himself."

We feel that it is practically unnecessary to present any lengthened argument pertaining to this portion of the Constitution, as the broad principle therein set forth has been so well passed upon by all of the courts. The principle has always been jealously protected and safeguarded, however, in passing, we respectfully call attention to the language of the Supreme Court in *Counselman* v. *Hitchcock*, 142 U. S. 562, 35 L. ed. 1110, wherein this Court stated:

> "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be

compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

In *Gouled* vs. *U. S.*, 255 U. S. 296, 65 Law Ed. 648, the Supreme Court of the United States, through Mr. Justice Clarke, stated as follows:

"The part of the 5th Amendment here involved reads:

" 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, in *Weeks* v. *United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizens,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been re-

peatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers."

The Securities Act of 1933, as amended, and particularly Section 22 (c) thereof, (Section 77 v (c) Title 15 U.S.C.A.) provides as follows:

"No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

There can be no question but that the foregoing provision of the Securities Act of 1933, is constitutional and, in fact, there is a long line of authorities holding that under the Fifth Amendment to the Constitution, Congress has the power to grant such immunity and amnesty to persons who appear and testify, under compulsion, in any criminal proceeding.

In the instant case, we have the verified and sworn plea of Petitioner to the effect that he was compelled to appear before the Securities and Exchange Commission on three different occasions and that at said hearings he appeared under subpoena and was compelled to testify against himself and at the same time claimed his immunity against self-incrimination. In his plea in bar Petitioner set forth that he testified under oath to various questions and matters concerning his identity and relationship to the matters for which he was indicted and later found guilty by the court, including matters pertaining to his personal entries, books and records. His plea in bar has attached thereto a letter from the Securities and Exchange Commission stating that said evidence *had been transmitted to the Attorney General for criminal prosecution and that an Indictment had been returned.*

In the plea in bar Petitioner requested that Respondent produce a transcript of Petitioner's said testimony which the Respondent, for some unanswerable reason, objected to producing and feebly attached to their objection an affidavit of one of the attorneys of the Commission—*one of their own attorneys.*

The plea in bar of Petitioner, duly verified, states that he appeared before three *hearings* of the Commission and Respondent, in its motion to strike the plea in bar, in paragraph IV thereof, refers to the proceedings as "proceedings or hearings." (R. 47) Nowhere does Respondent allege or set forth that said proceedings were private investigations but, on the contrary, admits, in substance, that the proceedings were *hearings.*

The Securities Act of 1933 gives the Securities and Exchange Commission the power to make rules and regulations to carry out the provisions of the Act, (Section 77 s (a), Title 15, U.S.C.A.), and pursuant thereto the Commission promulgated the following rule which was in effect at the time of the testimony of Appellant before the Commission:

> "Rule IV. Hearings; Evidence. * * *
>
> (c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter."

The Circuit Court of Appeals took the viewpoint that Rule IV, *supra,* had no application to testimony taken in the course of investigations as distinguished from *hearings* and cites as authority therefor the cases: *In re Securities and Exchange Commission,* 84 F. (2d) 316, and *Securities and Exchange Commission* v. *Torr,* 15 Fed. Supp. 144. These were cases wherein the proceedings before the Commission were in fact *investigations* whereas in the instant case the proceedings were referred to as *hearings* and the reference to the proceedings as such was not disputed by Respondent.

It is readily to be seen why a transcript of the proceedings in a *secret investigation* would be withheld, but where the proceeding is one wherein petitioner's counsel is present, as in the instant case (R. 48) then we have an entirely different situation and we respectfully submit that such proceeding is a *hearing* within the meaning of the law and the rules and regulations of the Commission and that, as such,

petitioner was entitled to have produced in evidence a copy of the transcript of his testimony at such hearing as provided for by Rule IV of the rules and regulations of the Commission, and that it was error for the trial court to refuse petitioner's request therefor, in order to give him an opportunity to test the correctness of the purported transcript that might be presented under the proper rules of evidence governing introduction of such documents and instruments, instead of petitioner being at the mercy of the Circuit Court of Appeals in receiving in evidence, *de novo*, a purported copy of the same, uncertified to by the Court Reporter, and with no showing whatsoever that the same was a true and correct copy of what it purported to be as was done here.

We respectfully submit, therefore, that the Circuit Court of Appeals erred in affirming the judgment and sentence of the trial court and in approving the action of the trial court in overruling petitioner's plea in bar and his application to be heard on the merits thereof and to have produced in evidence the transcript of his testimony before the Securities and Exchange Commission in order that his counsel might have the right of cross-examination concerning the same and the right of testing its correctness and authenticity and we respectfully say that the opinion, and the judgment of the Circuit Court of Appeals herein in connection with the foregoing was and is contrary to the law and violative of the Constitutional rights of petitioner and in conflict with the great weight of authority and the decisions of this Court with reference thereto.

Point B

(Specification of Error No. 3)

The indictment was invalid and the demurrer of petitioner thereto should have been sustained.

The indictment charged petitioner in eleven counts with violations of the Securities Act of 1933, as amended, the Mail Fraud Statute (Sec. 338, Tit. 18, U.S.C.A.) and with a conspiracy to violate said laws (Sec. 88, Tit. 18, U.S.C.A.), all as more fully set forth in the petition, *supra.*

The indictment was not signed by the Foreman of the Grand Jury (R. 40). It was indorsed "A True Bill, Ernest W. Clarke, Foreman" (R. 40).

We are not able to ascertain whether the said Clarke was Foreman of the Grand Jury of the Western District of Oklahoma, foreman of the Federal Building, foreman of some W. P. A. project, or what. There is nothing whatsoever to indicate that he was the duly qualified Foreman of the Grand Jury regularly empaneled for the Western District of Oklahoma that presented the purported indictment.

In *United States* v. *Levally,* 36 Fed. 687 (D.C. W.D. Pa.), the court, in passing upon the sufficiency of an indictment wherein the Foreman of the Grand Jury wrote his name across the back of the indictment, held the same insufficient, saying that the same was an "insensible indorsement."

In *Frisbie* v. *United States,* 157 U. S. 160, 39 L. ed. 657, a similar question was presented to the Court, however, in that case the Court held that the objection as raised here by demurrer, came too late to be raised in the Supreme Court. Attention is directed, however, to the following language of the Court:

"There is in the Federal Statutes no mandatory provision requiring such indorsement or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such indorsement and authentication were essential. 'The indorsement is parcel of the Indictment and the perfection of it.' *King* v. *Ford*, Yelv. 99."

An indorsement on the back of a bill of indictment forms no part thereof. See *Lee Choy* v. *United States*, 293 Fed. 582, (U.S.C.A. Hawaii) and *Wechsler* v. *United States*, 158 Fed. 579 (U.S.C.A. N.Y.).

Counts 1 and 2 of the indictment were and are fatally defective in that the same wholly failed to negative the allegations contained therein.

Count 3 of the indictment, which attempted to charge a violation of Section 17 (a) (2) of the Securities Act of 1933, as amended, is fatally defective in that said count failed to charge wherein petitioner omitted to state material facts necessary to be stated to make the statements made, in the light of the circumstances under which they were made not misleading.

The allegations in the indictment, generally, are that petitioner failed to state the location of certain non-producing oil wells around his property and that, therefore, such omissions constituted an omission of a material fact.

We respectfully submit that the omission to refer to non-productive wells between an anticipated field and other producing oil fields surrounding the anticipated field, has no bearing whatsoever on the question of whether oil will be produced in the anticipated field. This is a well known

fact in the petroleum industry. In fact, the presence of dry holes in a general area, with the knowledge of the various strata passed through, is not only indicative of a producing oil structure; but, in most cases, is the *indicia* of production.

It is a well accepted principle in the petroleum industry that new oil fields are located and found by virtue of the subsurface data obtained from dry holes drilled around the new structure. There is no representation that the well being drilled by petitioner, referred to in the third count of the indictment, was a part of any of the other producing fields, nor was there any representation that all of the pools together was just one oil field. There could be, therefore, no fraud in omitting to make reference to dry holes which were off-structure as it is well established in the Mid-Continent area that said dry holes are helpful in determining whether the location of a new well, such as petitioner was drilling, was on oil bearing structure or not.

Count four of the Indictment charges Petitioner with a violation of Section 5 (a) (1) of the Securities Act of 1933, as amended; (Section 77 c (a) (1) Title 15 U.S.C.A.) and count 5 of the Indictment charges a violation of Section 5 (a) of the Securities Act of 1933, as amended, (Section 77 e (a) (2), Title 15 U.S.C.A.) in the sale of securities, the said counts alleging that said securities were sold and offered for sale "there not then being in effect a registration statement filed with the Securities and Exchange Commission."

Section 5 (a) of the Securities Act of 1933, as amended, (Section 77 c and 77 e, Title 15 U.S.C.A.) prohibits the use of the United States Mail or the use of Interstate Commerce

to sell or offer for sale securities unless a registration statement is in effect, however, Section 3 (b), (Section 77 c (b) Title 15 U.S.C.A.) provides as follows:

> "The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000."

Pursuant to the foregoing statute, the Securities and Exchange Commission duly promulgated and made effective, as a part of its general rules and regulations, Rule 200, which provides in substance that an offering, as in the instant case, where the aggregate offering price to the public did not exceed the sum of $30,000, no registration is necessary.

This rule was in full force and effect at the time the mails were used by Petitioner in said counts 4 and 5 of the Indictment. The provision of the rule, not exempting certificates of interest in trusts, did not become effective until March 1, 1938, by virtue of the adoption of the Commission of Regulation B-T, which was subsequent to the use of the mails by Petitioner.

Even though Section 5 of the Securities Act of 1933, requires the registration of certain securities, nevertheless Section 3 of the Act exempts from registration certain de-

scribed classes of securities, including those exempted by the Commission under its General Rules and Regulations, where the issue is under the $100,000. Therefore, we respectfully submit that counts 4 and 5 of the Indictment are defective in that there is no allegation that the securities offered by Petitioner were not in the class of securities exempted from registration under Section 3 of the Securities Act of 1933, and the Rules and Regulations of the Securities and Exchange Commission exempting various classes of securities as provided for by Section 3 (b) of said Act.

Rule 200 permitted the sale of securities, without registration up to $30,000, and other rules of the Commission permitted the sale of securities, without registration, upon complying with certain requirements up to $100,000. An allegation, therefore, to the effect that the accused sold securities without registration states no cause of action whatsoever. *It is no violation of the law to sell securities without registration.* The Act exempts certain classes of securities without registration and the rules and regulations promulgated under the Act exempts certain securities from registration and it is respectfully submitted that said counts of the Indictment are fatally defective and wholly fail to state a cause of action without alleging that the securities sold or offered for sale were of a class required to be registered and not exempt under the provisions of the law and the rules and regulations promulgated under said Act.

It is elementary that securities may be sold and offered for sale without there being in effect a registration statement.

We submit that the point raised is analogous to that of the decisions of the courts in passing on the validity of indictments under the Harrison Narcotic Act. An indictment simply charging the possession of narcotics is invalid. There must be a charge that the accused was a person who had not registered and *who was required to register under the law.* In the instant case there is no allegation that the securities sold or offered for sale were of a class requiring registration.

See *United States* v. *Gin Fuey Moy,* 241 U. S. 394; *United States* v. *Wilson,* 225 Fed. 82; *United States* v. *Carney,* 228 Fed. 163; *Swartz* v. *United States,* 280 Fed. 115; and *Ex parte McGonigal,* 2 Fed. (2d) 784.

Counts 6 to 10, inclusive, of the indictment charge petitioner with a violation of Section 338, Tit. 18, U.S.C.A., i. e., with having devised a scheme and artifice to defraud and with the use of the mails to effectuate the same (R. 29-36).

The pertinent language of the Mail Fraud Statute and of Section 17 of the Securities Act of 1933 (Sec. 77 q, Tit. 15, U.S.C.A.) are substantially the same.

The mail fraud statute is the prior statute; the Securities Act is the latter one, and we respectfully submit that insofar as the same is applicable to the sale or offer of sale of securities through the United States mails in carrying out and employing a fraudulent scheme as that described in the indictment herein, the provisions of both statutes are substantially the same and that it was the intention of Congress in the amendment to the Securities Act of 1933, insofar as the same applies to the securities in question here, that the Mail Fraud Statute (Section 338, Title 18, U.S.C.A.) was and is repealed.

Attention is directed to the fact that when the Securities Act of 1933 was first enacted, Section 5 (c) thereof provided:

> "The provisions of this Section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single state or territory * * *."

and that this provision was repealed in 1934, giving the Securities Act full control of the use of the mails whether interstate or intrastate, thus reflecting that it was the intention of Congress in that amendment that the Securities Act should repeal and supersede the mail fraud statute insofar as the same is applicable to securities of the type and class involved herein.

We realize that the District Court for the Northern District of Texas, in the case of *United States* v. *Alluan, et al.*, 13 Fed. Supp. 289, held that the Securities Act of 1933 did not repeal the mail fraud statute and that the same view was taken by the Circuit Court of Appeals for the Second Circuit in the case of *United States* v. *Rollnick et al.*, 91 Fed. (2d) 911. With the holdings of these two courts, we cannot agree. They may have some persuasive effect, but certainly are not binding and we submit that an analysis of the law can only lead to the conclusion that the mail fraud statute was repealed by implication by the enactment of the Securities Act of 1933.

In the Alluan case, the view is taken by the court that under the mail fraud statute the offense could be committed before any securities were sold and that the violation under the Securities Act was not completed until the sale actually took place. The court further held to the view that the

punishment under the mail fraud statute was for the fraud itself the violation being complete without a sale, whereas, the punishment for the Securities Act was for the fruit of the fraud, requiring an actual sale. Of course, this view is not the law and is erroneous.

Section 17 of the Securities Act, as above quoted, refers to the employment of a device, scheme or artifice to defraud and the use of the mails or interstate commerce to effectuate the same. Section 5 of the Securities Act refers to the use of the mails in the sale of securities and Section 2 (3) of the Act (Section 77 b (3) Title 15, U.S.C.A.) provides that the term "sale" shall include every attempt or offer to dispose of any security, that is, any letter, or writing, going through interstate commerce or the United States mails, just the same as in the mail fraud statute. There need be no actual sale to violate the Securities Act.

Where there are two acts of Congress on the same subject and the last embraces the provisions of the first, insofar as the same is applicable to a particular case before the court, the effect of the subsequent act is that of repealing the prior law by implication. See *United States* v. *Tynen*, 78 U. S. 95, 20 L. ed. 153.

We respectfully submit, therefore, that insofar as counts 6 to 10, inclusive, of the Indictment are concerned, the same charge no violation of any valid and subsisting law of the United States and that the demurrer to said counts should have been sustained by the trial court.

Count 11 of the indictment charges a violation of Section 88, Title 18, U.S.C.A., i. e., a conspiracy by and between Petitioner and one R. B. Binger, to commit violations of the

Securities Act of 1933, and of the mail fraud statute (Section 338, Title 18, U.S.C.A.) in the sale of securities through the mails, and in interstate commerce.

There are no allegations in said count of the indictment to the effect that the securities sold were of a class required to be registered with the Securities and Exchange Commission which, as presented, *supra,* we submit the allegations are too vague and indefinite and do not state a cause of action against petitioner.

Point C

(Specification of Error No. 4)

The Circuit Court of Appeals erred in affirming the judgment of the trial court in sentencing petitioner to three years imprisonment on the eleventh count of the indictment, i. e., conspiracy.

Petitioner was charged and found guilty of a violation of the eleventh count of the indictment and sentenced thereupon to serve three years in a penitentiary to be designated by the Attorney General.

Section 88, Title 18, U.S.C.A., provides that the maximum confinement for violation of this statute is two years instead of three years as petitioner was sentenced.

The Circuit Court of Appeals (R. 75) takes the position, with reference to the eleventh count of the indictment, that since it is a good count, and since petitioner's sentence was to run concurrently with other counts in the indictment, that the sentence of three years on the conspiracy count should stand. The opinion of the Circuit Court of Appeals, after holding that the eleventh count of the indictment was good stated that there was no need to explore the questions presented in connection with the other counts. We respect-

fully submit that the Circuit Court of Appeals erred in affirming the judgment of the trial court wherein petitioner was sentenced to serve three years on each count of the indictment (the same including the eleventh count), the court taking the view that said count was the *good* count of the indictment and the court failing and refusing to explore the questions presented as to the other or *bad* counts of the indictment.

Point D

(Specification of Error No. 5)

The Circuit Court of Appeals erred in receiving in evidence, de novo, over the objection of petitioner, certain exhibits and evidence not included in the record on appeal.

We think the facts with reference to this proposition have been sufficiently stated, *supra,* however, it will be recalled that at the time of the presentation of the argument of counsel herein before the Circuit Court of Appeals, the court received in evidence, over the objection of petitioner (R. 55), an affidavit of an Assistant United States Attorney and a purported transcript of the testimony of petitioner before the Securities and Exchange Commission. These exhibits and this evidence were received by the Circuit Court of Appeals, *de novo,* and neither was included in the record on appeal.

First of all, it is respectfully submitted that an affidavit is not even admissible in the trial court, much less in the Appellate Court, as original evidence. See *Holt* v. *United States,* 94 Fed. (2d) 90, (C.C.A. 10th). Neither was the purported transcript admissible, which was not a part of the record on appeal, there being no test made of its correct-

ness or authenticity and the same wholly failing to show that it was certified to by the Court Reporter.

Section 212, Title 28, U.S.C.A. (Sec. 117 of the Judicial Code) provides as follows:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, *with appellate jurisdiction,* as hereinafter limited and established."

It has been repeatedly held that the Circuit Court of Appeals has no original jurisdiction and that its jurisdiction is appellate only, except in such cases as may be necessary to carry out such appellate jurisdiction. See *Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer,* 235 U. S. 55; *Travis County* v. *King Iron Co.,* 174 U. S. 801; *Fowler* v. *Seymour,* 95 Fed. (2d) 627 (C.C.A. 9th 1938); *Millers Mut. Fire Ins. Ass'n* v. *Warroad Potatoes Growers Ass'n,* 94 Fed. (2d) 741 (4th C.C.A., 1938); *Hill* v. *Douglass,* 78 Fed. (2d) 851 (C.C.A. 9th 1935).

In *Hall* v. *United States,* 78 Fed. (2d) 168 (10th C.C.A. 1935), the same Circuit Court of Appeals, from which a review is sought herein, stated as follows:

> "*The jurisdiction of the Circuit Courts of Appeals is purely appellate, and they have no original jurisdiction* except such as is necessary to aid, protect, or enforce their appellate jurisdiction. *United States* v. *Mayer,* 235 U. S. 55, 65, 35 S. Ct. 16, 59 L. Ed. 129; *Frankel* v. *Woodrough* (C.C.A.) 7 F. (2d) 796, 797; *Whitney* v. *Dick,* 202 U. S. 132, 137, 26 S. Ct. 584, 50 L. Ed. 963. For us to entertain a motion for a new trial filed in the District Court, would be to exercise original, not appellate, jurisdiction.

"The proper procedure is indicated in *Roemer* v. *Simon*, 91 U. S. 149, 150, 23 L. Ed. 267, where the court said: 'It is clear, that, after an appeal in equity to this court, we cannot, upon motion, set aside a decree of the court below, and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. *No new evidence can be received here.*" (Italics supplied).

Attention is also directed to the language of the Court of the Fourth Circuit Court of Appeals in *Stephenson* v. *Equitable Life Assur. Soc.* v. *United States*, 92 Fed. (2d) 406, wherein the court had to say at page 410:

"As the judge below did not pass upon the merits of the case but dismissed it for lack of jurisdiction, and there is no assignment of error relating to the merits, we cannot pass upon the merits here. In reversing the dismissal on the jurisdictional point there is nothing that we can do but remand the cause for further proceedings. We have been urged to interpret the incontestable clause of the policy; but our powers are solely those of an appellate court, and we can pass on the merits of a cause only by way of review."

See also *Chisholm-Ryder Co., Inc.* v. *Buck*, 65 F. (2d) 735 (C.C.A. 4th 1933).

We respectfully submit, therefore, that the Circuit Court of Appeals erred in receiving and considering in evidence, *de novo*, the foregoing evidence, none of which was included in the record on appeal, and none of which was admissible, neither in the trial court nor in the Appellate Court.

The statutes and the authorities are clear that the Circuit Court of Appeals, in cases such as the instant one, are not courts of original jurisdiction but are simply Appellate

Courts and, therefore the Circuit Court erred in receiving in evidence the foregoing exhibits over the objection of petitioner with no opportunity on his part of testing the accuracy of the same and with no opportunity on his part of being heard before the Appellate Court on the merits of his plea in bar.

We respectfully submit, furthermore, that the holding of the Circuit Court of Appeals herein with reference to the foregoing was and is in conflict with the decisions of the Circuit Court of Appeals of other Circuits concerning the same matter; that the same involves an important question of a Federal law and is an erroneous decision on an important question of general law in conflict with the weight of authority and the applicable decisions of this Court and that, as such, a Writ of Certiorari should be granted herein.

CONCLUSION

It is, therefore, respectfully submitted that for the reasons hereinbefore stated, this cause is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit herein.

J. Forrest McCutcheon,
801 Perrine Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner.

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